No. 98-282

FILED
SEP 10 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1998

JOHN S. TAMAGNI and JANET B. TAMAGNI,

Petitioners,

-v.-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMISSIONER OF TAXATION AND FINANCE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondent Commissioner of Taxation and Finance
The Capitol
Albany, NY 12224
(518) 473-0903

BARBARA G. BILLET
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

Of Counsel

THE REPORTER COMPANY AND THE WALTON REPORTER, INC.
181 Delaware Street, Walton, NY 13856—800-252-7181
(4649 – 1998)
Printed on Recycled Paper

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review a decision of the New York Court of Appeals that New York need not provide a credit for tax paid in other States on income derived from intangibles by nondomiciliary residents, when petitioners, New Jersey domiciliaries who were also New York residents during the tax years at issue, and who could have obtained a credit from New Jersey for tax paid to New York, have failed to demonstrate that they suffered any injury in fact attributable to New York's taxation of their income, and thus have failed to establish their standing to maintain the present proceeding.

2. Whether this Court should grant certiorari to review a decision of the New York Court of Appeals that New York's failure to provide a credit to nondomiciliary residents for income tax paid to other States on income derived from intangibles does not implicate the Commerce Clause of the United States Constitution, when (A) New York's treatment of nondomiciliary residents, even if it implicates interstate commerce, does not in any event discriminate against interstate commerce and therefore does not violate the Commerce Clause, and (B) the Court of Appeals correctly concluded that New York's taxation of nondomiciliaries who are also New York residents does not substantially affect interstate commerce.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

In addition to the provisions set forth by petitioners, the following statutes and regulations are involved:

N.Y. Tax L. § 620(a) (McKinney 1987) provides that

> [a] resident shall be allowed a credit against the tax otherwise due under this article for any income tax

> imposed for the taxable year by another state of the United States . . . upon income both derived therefrom and subject to tax under this article.

N.Y. Comp. Codes R. & Regs. tit. 20, § 120.1(a)(2) (1995) provides that the credit allowed a resident individual for income tax paid to another State

> is allowable only for that portion of the income tax . . . which is applicable to the income derived from sources within such other [State].

N.Y. Comp. Codes R. & Regs. tit. 20, § 120.4(d) (1995) excludes from the definition in § 120.1(a)(2) of tax paid on income derived from sources within another State any tax on

> income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other state.

STATEMENT OF THE CASE

New York "resident individuals" are liable for state income tax on all their income, regardless of its source. N.Y. Tax L. § 612 (McKinney 1987). A resident individual, according to the Tax Law, is either one "who is domiciled in this State" or one "who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state." *Id.* § 605(b).

It is therefore possible that New York and another State will treat the same individual, domiciled in one State but also residing in the other, as a "resident," and thus be empowered under the Due Process Clause of the United States Constitution to impose state tax on all his income, regardless of source, *see New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937). Most

States deal with this possibility as they do with the likelihood that many state residents will have income attributable to another State, *see, e.g.*, N.Y. Tax L. § 631 (McKinney 1987) -- by providing a credit against taxes paid to another State. Thus, for example, New Jersey provides its residents with a credit "for the amount of any income tax or wage tax imposed for the taxable year by another State of the United States * * * with respect to income which is also subject to tax" in New Jersey. N.J. Stat. Ann. § 54A:4-1(a) (West 1996). Similarly, New York provides that "[a] resident shall be allowed a credit against the tax otherwise due under this article [i.e. personal income tax] for any income tax imposed for the taxable year by another state of the United States, a political subdivision of such state, the District of Columbia or a province of Canada, upon income both derived therefrom and subject to tax under this article." N.Y. Tax L. § 620(a) (McKinney 1987). This credit applies only to income "derived from sources within another state [or] political subdivision of another state." N.Y. Comp. Codes R. & Regs. tit. 20, § 120.1(a) (1995). New York's definition of such income does not include "income from intangibles" such as stock dividends, unless "such income is from property employed in a business, trade or profession carried on in the other state." *See id.* § 120.4(d). Thus, New York may impose its income tax upon the income from intangibles of a resident who, as a domiciliary of another State, may also be required to pay tax to the domicile State on the same income.

Petitioners John S. and Janet B. Tamagni were, during the years at issue, domiciliaries of New Jersey (35).[1] Mr. Tamagni is an investment banker and a member of the firm of Lazard Freres, at whose main office he has worked since 1975 (7). During the years at issue, petitioners owned an apartment at 29 East 64th Street in Manhattan (7). For Mr. Tamagni, this apartment was "[p]rincipally * * * a place that I could spend the night if I had been working late or to reduce the rigors of commutation from Summit, New Jersey" (126-127). For Mrs. Tamagni, the apartment was an effort, albeit a "disappoint[ed]" one, to fulfill her "dream" of "be[ing] a 'New Yorker'" (343). For 1987, 1988 and 1989, petitioners filed New York State nonresident income tax returns, calculating their tax by allocating a percentage of their income to New York State (528-550). In each of those years, their income was approximately $2 million (29).

On March 3, 1992, the Division of Taxation of the New York State Department of Taxation and Finance issued three statements of audit changes to petitioners, showing income tax due of $64,115.51 plus penalty and interest for 1987; $70,353.28 plus penalty and interest for 1988; and $58,072.43 plus penalty and interest for 1989 (519-527). In each case, the additional tax was attributable primarily to the Department of Taxation and Finance's conclusions that "the taxpayers maintained a permanent place of abode in New York City [and] did not submit adequate records to establish that they spent less than 184 days in New York State and City," and that they were therefore subject to tax "as residents of New York State and City" (519, 522, 525).

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[1]Parenthetical citations are to the Record on Appeal in the New York Court of Appeals. Parenthetical citations preceded by letters are to the appendices to the petition for certiorari.

On October 5, 1992, petitioners filed a petition with the Division of Tax Appeals, contending that they were not in fact residents of New York during the years in question and that the statutory definition of residency in N.Y. Tax L. § 605(b)(1)(B) violated the Commerce Clause of the United States Constitution (509-515). On August 25, 1994, after a hearing, an Administrative Law Judge (ALJ) issued a decision concluding that petitioners were not present in New York State or New York City for more than 183 days in 1987, that they were present in both State and City for more than 183 days in 1988, and that they were present in New York State but not New York City for more than 183 days in 1989 (D-64-65). Thus, petitioners properly filed nonresident State and City returns for 1987 and a nonresident City return for 1989 (D-64-65). The ALJ declined to address petitioners' constitutional arguments in view of "the lack of jurisdiction of the Division of Tax Appeals to determine the constitutionality of a statute on its face" (D-66).

Petitioners filed exceptions to the ALJ's determination with the New York State Tax Appeals Tribunal. On November 30, 1995, the Tax Appeals Tribunal issued a decision affirming the ALJ's determination. This decision, like the ALJ's determination, centered on determining that petitioners qualified as New York residents (C-1-2). The Tribunal also addressed the constitutional issue raised by petitioners, concluding that petitioners had failed to show "how their domicile in New Jersey and their statutory residence in New York State constitutes interstate commerce" implicating the Commerce Clause (C-61).

On March 29, 1996, petitioners commenced in the Appellate Division, Third Department, a proceeding pursuant to N.Y. Tax L. § 2016 (McKinney 1987) challenging the Tax Appeals Tribunal's determination. On June 19, 1997, the Appellate Division issued an opinion and judgment confirming the Tax Appeals Tribunal's

determination. Like the Tribunal, the Appellate Division concluded "that the Commerce Clause is not implicated here" (B-3).

Petitioners appealed to the New York Court of Appeals, which on May 14, 1998, issued a decision affirming the judgment of the Appellate Division. The Court of Appeals concluded that New York's failure to grant petitioners a credit for taxes on income from intangibles paid to other States does not violate the Commerce Clause. The Court held that New York's residency statute "does not substantially affect interstate commerce and, therefore, the protections of the dormant Commerce Clause are not applicable" (A-1-2). Moreover, the Court of Appeals added, "[e]ven assuming arguendo that the Commerce Clause is implicated, the tax does not violate the dormant Commerce Clause because the tax does not facially discriminate against interstate commerce, and States have traditionally retained broad powers to tax their own residents" (A-2).

The Court of Appeals noted that, as this Court has held, "the Commerce Clause is implicated" if "the tax at issue 'substantially affects' interstate commerce" (A-7, quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)). The only activities that substantially affect interstate commerce are, the Court of Appeals said, "economic activities" (A-8). In the Court's view, "[t]he New York income tax is based upon a taxpayer's resident status, without regard to any specific commercial or economic transaction or activity" (A-8). The tax is imposed with regard to neither Mr. Tamagni's "commute" nor "the specific nature of his activities" in New York, but rather solely upon the basis of "his presence and maintenance of a permanent place of abode in New York, without regard to any economic activities incidental to his presence here" (A-8-9). According to the Court of Appeals, the fact that "commuters who do not own or lease property in New York are not subject to" taxation as residents "demonstrates that the tax is completely indifferent

to the interstate activities which [petitioners claim] are affected" (A-9). Thus, the Court concluded, "the interstate Commerce Clause is not implicated by the New York income tax" (A-9).

The Court of Appeals nonetheless proceeded to inquire further into the case by assuming that the Commerce Clause is implicated by state taxation of nondomiciliary residents (A-9). The Court below recognized that a violation of the so-called "dormant" or "negative" Commerce Clause[2] must be premised on "discrimination" against interstate commerce: "If there is no differential treatment of identifiable, similarly situated in-State and out-of-State interests, there is no dormant Commerce Clause violation" (A-10). Because " 'the dormant Commerce Clause protects markets and participants in markets, not taxpayers as such' " (A-11, quoting *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824 (1997)), "the first step [in negative Commerce Clause analysis] is to identify the interstate market that is being subjected to discriminatory or unduly burdensome taxation," which in turn requires "identification of the similarly situated in-State and out-of-State interests which the tax treats differently" (A-11). The tax at issue in the present case, the Court of Appeals observed, "does not operate to the disadvantage of any identifiable interstate market, but rather simply taxes residents based on their status as residents" (A-12). Nondomiciliary residents are, the Court of Appeals said, "not similarly situated to New York domiciliaries" who reside nowhere else, for "[t]he former enjoy the privileges and protections of another State, and may therefore be subject to taxation by that State, which the latter do not" (A-12). "There is," the Court of Appeals said, "simply no similarly situated out-of-state interest

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[2] The Commerce Clause includes a "negative" component that prevents the States from interfering unduly with interstate commerce. *See, e.g., Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995).

to compare to an in-state resident for purposes of applying a dormant Commerce Clause analysis" (A-14). Petitioners, in other words, "were taxed for being New York residents and not for their interstate activities" (A-14).

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE NOT ESTABLISHED THEIR STANDING TO MAINTAIN THIS PROCEEDING.

Because petitioners have not established their standing to bring this lawsuit, this Court lacks jurisdiction over the case. As this Court has recently noted, "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies'," and "[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998) (cit om). "First and foremost" among the requirements of standing, "there must be alleged (and ultimately proven) an 'injury in fact' -- a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical." ' " *Id.* (cit om). The party invoking federal jurisdiction bears the burden of establishing injury in fact, *id.* at 1017, which " 'must affirmatively appear in the record,' " *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (cit om). The question of a party's standing may be raised at any point in the judicial process.[3] *See, e.g., Juidice v.*

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[3]Respondent raised the question of standing in the court below both in its brief and at oral argument. Presumably because New York courts face no state constitutional constraints on their jurisdiction by virtue of a party's lack of standing, *see, e.g., Society of Plastics Industry v. County of Suffolk*, 573 N.E.2d 1034, 1040 (N.Y. 1991), the Court of Appeals did not address the matter in its opinion.

Vail, 430 U.S. 327, 331 (1977) (Court inquired into standing, even though the issue was not raised by the parties).

The present petitioners have never established that they suffered a concrete harm as a result of New York's statutory scheme. The gravamen of their suit is that they face taxation of their income from intangibles by both New Jersey and New York.[4] Petitioners, however, never established that they actually paid tax to both States on the same income. They certainly were under no legal obligation to do so. New Jersey provides its residents with a credit for income tax imposed by another State "with respect to income which is also subject to tax" in New Jersey. N.J. Stat. Ann. § 54A:4-1(a) (West 1996). Petitioners could have claimed a credit from New Jersey for tax paid to New York on their income from intangibles, and nowhere in the record of this case do they indicate that they in fact paid tax on the same income to both States.

Petitioners (and all other New Jersey domiciliaries) thus do not face even a hypothetical injury, for the blanket credit offered by New Jersey for taxes paid on any income taxable by New York guarantees that those potentially liable for income tax to both States need never encounter double taxation. But in any event, petitioners have failed to establish any concrete, actual injury. For all that appears from the record, petitioners claimed the New Jersey credit to which they were entitled, and were doubly taxed on no portion of their income during the tax years in question. Petitioners therefore have not established that they suffered any injury in fact as a consequence of New York's failure to give them a credit for taxes paid to another State on their income from intangibles. Accordingly,

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[4]Petitioners suggest (Pet. pp. 14, 27) that the possibility of double taxation also arises when a nondomiciliary resident earns income from sources in a third State. It appears from the record that petitioners had no such income.

they do not have standing to invoke this Court's jurisdiction to entertain their petition.

II. THIS CASE HAS NO BEARING UPON THE STATUS OF NONRESIDENT INTERSTATE COMMUTERS, WHO IN ANY EVENT ARE FULLY PROTECTED FROM DISCRIMINATORY STATE TAXATION WITHOUT RECOURSE TO THE COMMERCE CLAUSE.

Petitioners do not argue that the decision below is in conflict with any decision of this or any other Court. Rather, as the first basis they offer this Court for granting their petition, petitioners erroneously suggest (Pet. p 14) that this case has significance for all "taxpayers who live in one state and work in another." Repeating this error elsewhere in the petition (pp 8-9), they claim that "the incidence of multiple taxation is a common and severe problem" for the "approximately four million interstate 'tax commuters' " -- a term that applies, as the article from which petitioners extract their "four million" figure makes clear, not to residents of more than one state, but rather to "individuals working outside their state." David Schultz, *State Tax Commuters: Classification and Estimates*, State Tax Notes, August 10, 1998, 355. Such nonresident "tax commuters" are liable for New York tax only on income "derived from or connected with New York sources." N.Y. Tax L. § 631(a) (McKinney 1987). They are not subject, even hypothetically, to the New York taxation of income from intangibles that is petitioners' sole source of grievance in this case. Far from raising an issue "of vital importance to countless individuals across the country" (Pet. p 14), petitioners' case has significance only for those who (1) qualify as residents of more than one State, (2) have income that is subject to taxation by both States, and (3) cannot obtain a credit from one State for all taxes paid to the other.

This is not a case, moreover, in which this Court must grant review lest States be "free to subject . . . nondomiciliary workers to discriminatory taxes" (Pet. p 24). For such people -- as this Court has recently demonstrated with respect to New York taxation of nonresidents -- the courts stand ready to provide complete constitutional protection against discriminatory state taxation without need for recourse to the Commerce Clause. *See Lunding v. Tax Appeals Tribunal*, 118 S. Ct. 766 (1998) (denial by New York to nonresident taxpayer of deduction available to New York residents for alimony payments was unjustified discrimination against nonresidents in violation of Privileges and Immunities Clause).

III. THERE IS NO REASON TO GRANT THE PETITION IN ORDER TO DETERMINE WHETHER THE COMMERCE CLAUSE IS IMPLICATED BY NEW YORK'S FAILURE TO PROVIDE A CREDIT FOR TAX PAID TO OTHER STATES ON INCOME DERIVED FROM INTANGIBLES BY NONDOMICILIARY RESIDENTS.

A. Because New York's Treatment of Nondomiciliary Residents does not in any Case Discriminate Against Interstate Commerce, There is no Reason for the Court to Grant the Petition in Order to Ascertain Whether New York's Taxation of Income from Intangibles Implicates the Commerce Clause.

The bulk of petitioners' argument in support of a grant of certiorari (Pet. pp 15-24) is devoted to their contention that this Court should review the case to determine whether New York's taxation of nonresident domiciliaries "substantially affects interstate commerce within the meaning of the Commerce Clause." As the decision of the New York Court of Appeals

makes clear, however, in the present case this can be viewed as an academic question. A taxpayer's claim that a state tax discriminates against interstate commerce always entails two inquiries: first, whether "dormant Commerce Clause jurisprudence is wholly inapplicable to th[e] case, because interstate commerce is not implicated," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1596 (1997); and then, if interstate commerce is implicated, whether the tax "discriminates against interstate commerce," *id.* at 1598. The New York Court of Appeals engaged in precisely this analysis, finding that interstate commerce was not implicated by New York's taxation of nondomiciliary residents, but then, "assuming arguendo that the Commerce Clause is implicated," finding that the tax does not in any case "discriminate against interstate commerce" (A-2). Because, as the New York Court recognized, it is easy to show that New York's taxing scheme does not discriminate against interstate commerce, the question of whether the Commerce Clause is implicated at all lacks practical significance in this case.

As this Court has noted, "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824 (1997). In the present case, petitioners, as New Jersey domiciliaries who are also New York residents, are similarly situated neither to New Jersey domiciliaries who work but do not reside in New York nor to New York domiciliaries who work in either State and reside only in New York. Rather, their situation is analogous only to that of New York domiciliaries who also reside in New Jersey, and who face exactly the same tax liability (including the benefit of a New Jersey tax credit) faced by petitioners. According to this Court, " '[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are. . similarly situated.' " *Camps Newfound*, 117 S. Ct. at 1601 n 16 ((quoting *id.*

at 1611) (Scalia, J., dissenting)) (brackets and ellipsis in majority opinion). As residents of two States, petitioners are not similarly situated to those who reside only in the State in which they are domiciled. Their status as dual residents, the Court below recognized, both entitles them to "the protections and services which [each] State affords [only] its residents" (A-15) and subjects them to state taxes that nonresidents do not face (A-16), *see, e.g.*, *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) (States may tax residents on their worldwide income but may tax income of nonresidents only insofar as it is derived from in-state sources).

Thus, the difference between New York's treatment of petitioners and of New York nonresidents with New York income is justified by petitioners' status as New York residents. Because petitioners are New York residents, they are not similarly situated to nonresidents with New York income and do not under any circumstances face "discrimination" under the Commerce Clause when compared with such nonresidents. Accordingly, even if the Commerce Clause is implicated in this case, petitioners cannot prevail, and there is no reason to grant the petition simply to ascertain whether New York's taxation of the income from intangibles of nondomiciliary residents "substantially affects" interstate commerce.

B. The Court Below Correctly Concluded that New York's Taxation of Nondomiciliary Residents does not Substantially Affect Interstate Commerce.

Even if the issue of whether the Commerce Clause is implicated by New York's taxation of nondomiciliary residents had independent significance in the present case, it would not justify a grant of the petition. The New York Court of Appeals correctly noted that the income tax on petitioners "is imposed solely based upon [their] presence and maintenance of a permanent place of abode in New York, without regard to any

economic activities incidental to [their] presence here" (A-9). Unless a nondomiciliary's mere physical presence in a State is sufficient to trigger Commerce Clause scrutiny, the Court of Appeals' decision on this point was correct and need not be re-examined.

Even on petitioners' own terms, moreover, the activities on which they rely do not qualify as interstate commerce. Their strategy is to extend the coverage of the Commerce Clause to those activities simply by virtue of the fact that, if petitioners had not at some point traveled from New Jersey to New York, they would not have engaged in the activities. Thus, they contend (Pet. p 22) that their "purchase and maintenance" of a New York apartment involved them in interstate commerce and that merely spending sufficient time in New York to qualify as residents "involves participation in interstate commerce" through their routine purchase of goods and services. No court, however, has ever held that a State's residents, simply by purchasing residential property and buying at retail goods and services for personal consumption, are *themselves* engaged in interstate commerce. Petitioners never explain how these activities, when conducted by a nondomiciliary resident, necessarily involve interstate commerce any more than a domiciliary's would.

Similarly, petitioners contend (Pet. p 21) "that Mr. Tamagni's presence in New York was a result of his employment in the state [cit om] and employment is an inherently commercial enterprise involving multistate economic competition and opportunities." There is, of course, no doubt that Mr. Tamagni, in his work as an investment banker, is, like his New York domiciliary partners, engaged in interstate commerce. But it is another matter altogether to suggest that the Commerce Clause is inherently implicated *by virtue of* Mr. Tamagni's status as a New Jersey domiciliary who also is employed in New York. The very notion of "interstate

commerce" suggests that there is some other zone of activity that qualifies as "intrastate commerce." And it is the nature of the commerce itself, rather than the domiciles and residences of those who engage in it, that characterizes it as interstate or intrastate. If petitioners are correct (Pet. p 22), and interstate commerce is "affected" by virtue of "the relationship between Mr. Tamagni's job in New York, his home in New Jersey, and the decision to obtain the apartment in New York," then similarly the character of an intrastate enterprise in New York will change as soon as the enterprise hires a New Jersey domiciliary, and change again if the employee moves to New York, even as an intrastate enterprise doing the identical business next door will undergo no changes as long as its personnel remain stationary.

Thus, petitioners err in suggesting that their specific activities in New York implicate the Commerce Clause. Nor, as they mistakenly suggest (Pet, pp 19-20), does the decision of this Court in *Camps Newfound/Owatonna* demonstrate that the Tamagnis, simply by crossing state lines, are entitled to Commerce Clause protection. In *Camps Newfound*, the petitioner was a nonprofit corporation operating a Maine summer camp for children, most of whom were from outside of Maine. The camp successfully argued that a Maine statute providing a general exemption from real estate and personal property taxes for charitable institutions incorporated in Maine, but denying the exemption to charitable institutions operated principally for the benefit of nonresidents, discriminated against interstate commerce.

The State of Maine argued that the camp was not engaged in interstate commerce. This Court disagreed, finding that the camp was engaged in commerce "as a purchaser" and as "a provider of goods and services." 117 S. Ct. at 1596. Moreover, "[t]he attendance of these campers necessarily generates the transportation of persons across state lines that has long

been recognized as a form of 'commerce.' " *Id.* The Court likened summer camps to "hotels that offer their guests goods and services that are consumed locally," but are nonetheless deemed to be engaged in interstate commerce. *Id.* at 1597.

This summary makes clear that the decision in *Camps Newfound* has no application to the present case. It is of no consequence that the camp was deemed to be engaged in interstate commerce. So, undoubtedly, is the New York investment bank in which Mr. Tamagni is a partner, and so it would be if it were a nonprofit investment bank. So, too, are the businesses from which the Tamagnis purchased goods and services in New York or New Jersey. There is no question that the enterprises that "generate" the Tamagnis' travel across state lines are engaged in commerce, as is any business that assists in that travel. But these facts are immaterial. For *Camps Newfound* to have bearing on the present case, this Court would have had to conclude that *the nonresident campers themselves*, simply by virtue of traveling to Maine, were engaged in interstate commerce. Such a perspective is neither explicit nor implicit in *Camps Newfound* or anywhere else; indeed, this Court has expressly rejected it. *See United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting Commerce Clause as basis for Congress' authority to outlaw possession of firearm in "school zone," despite contention that "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe").

The New York Court of Appeals correctly concluded that an income tax based on a taxpayer's status as a New York resident simply does not implicate the Commerce Clause. This Court has never suggested that a State's residents, whatever their domicile, engage in interstate commerce merely by engaging in retail consumption or employment within the State. There is no need for this Court to grant certiorari to examine this self-evident conclusion.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
September 3, 1998

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondent Commissioner of Taxation and Finance
The Capitol
Albany, NY 12224
(518) 473-0903

BARBARA G. BILLET
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

DANIEL SMIRLOCK
Assistant Attorney General

of Counsel